SUPREME COURT, U. S.

IN THE

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# Supreme Court of the United States

October Term, 1973

No. 73-1722

MURRAY KAPLAN,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

**Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.**

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# Supreme Court of the United States

October Term, 1973
No. .....

MURRAY KAPLAN,

*Petitioner,*

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PEOPLE OF THE STATE OF CALIFORNIA,

*Respondent.*

**Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.**

Petitioner Murray Kaplan prays that a writ of certiorari issue to review the judgment and ruling of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above entitled action on January 29, 1974.

## Opinions Below.

No written opinion was rendered by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirming the judgment of conviction on January 29, 1974.[1]

[1]The affirmance followed remand by this Court in *Kaplan v. California,* 413 U.S.115.

**Jurisdiction.**

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered on January 29, 1974. A copy of the judgment appears in Appendix A hereto. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on February 20, 1974. A copy of the said order appears in Appendix B hereto.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code §1471; California Rules of Court, Rule 62. See also, California Rules of Court, Rules 24(a) and 28(b); *Smith v. California,* 361 U.S.147, 148, fn.2; *Virginia Ry. Co. v. Mullins,* 271 U.S.220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

**Questions Presented.**

(1) Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the judgment of conviction herein, violate the free speech and press and due process provisions of the First and Fourteenth Amendments and the interpretive decisions of the Supreme

Court rendered on June 21, 1973, in *Miller v. California*, 413 U.S.15; *Kaplan v. California*, 413 U.S.115; *Paris Adult Theatre I v. Slaton*, 413 U.S.49; *United States v. Orito*, 413 U.S.139; and *United States v. 12 200-Ft. Reels*, 413 U.S.123.

(2) Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, including the "utterly without redeeming social importance" test, on their face and as construed and applied to authorize the judgment of conviction herein, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of the Court rendered on June 21, 1973.

(3) Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, on their face and as construed and applied to authorize the judgment of conviction herein, without the use of a national community standard test which at the time of the trial of the petitioner limited state obscenity prosecutions, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of the Court rendered on June 21, 1973.

(4) Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the

*Memoirs* tripartite standards for judging obscenity, and which do not specifically define sexual conduct purportedly subject to regulation, on their face and as construed and applied to authorize the judgment of conviction herein, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of the Court rendered on June 21, 1973.

(5) Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the judgment of conviction herein, without any instruction to the jury on the applicable law of the case with respect to the specifically defined sexual conduct which the state obscenity statute purportedly proscribed, violate the free speech and press and due process provisions of the First and Fourteenth Amendments.

(6) Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the judgment of conviction, without proof of the essential element of *scienter*, violate the free speech and press and due process provisions of the First and Fourteenth Amendments.

**Constitutional and Statutory Provisions Involved.**

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code §§311 and 311.2 appear in Appendix C hereto.

**Statement.**

A petition for a writ of certiorari was initially granted in this case by this Court on June 26, 1972. *Kaplan v. California,* 408 U.S.921. Following hearing before the Court, the case was decided on June 21, 1973. *Kaplan v. California,* 413 U.S.115. The ultimate ruling of the Court was that the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, which had initially affirmed the judgment of conviction, be vacated and the case remanded to that court for further proceedings not inconsistent with the opinions of the Court in *Miller v. California,* 413 U.S.15, and *Paris Adult Theatre I v. Slaton,* 413 U.S.49, decided on the same day. The nature of the case and all prior state court proceedings appear in the briefs of the parties and the final opinion rendered by the Court. *Kaplan v. California,* October Term 1971, No. 71-1422.

**How the Federal Questions Are Presented.**

1. Following remand to the Appellate Department of the Superior Court of California for the County of Los Angeles, there was further briefing and argument before the said court. Petitioner urged that the judgment of conviction should be reversed upon the following grounds, among others: (a) The standards for judging obscenity embodied in the provisions of California Penal Code §§311 and 311.2 have been rejected as constitutionally impermissible by the rulings of the Court on June 21, 1973; (b) the aforesaid

provisions under which the judgment of conviction was rendered are vague, ambiguous, uncertain and overbroad; (c) the standards for judging obscenity contained in the statute are unworkable and incapable of objective measurement; (d) the statute fails to proscribe specifically defined sexual conduct; (e) the proceedings against petitioner arbitrarily, capriciously and discriminatorily deprived petitioner of his liberty and property without due process of law, abridged the exercise of freedoms of speech and press, denied the equal protection of the laws, and inflicted cruel and unusual punishment, in violation of the First and Fourteenth Amendments to the United States Constitution; and (f) the state obscenity statute, on its face and as construed and applied to authorize the jury to return a verdict of guilt against petitioner, without any instructions relative to the specifically defined sexual conduct allegedly proscribed by the law, as judicially construed, deprived petitioner of his liberty and property without due process of law and abridged the exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution.

2. Pending the ruling by the aforesaid Appellate Department of the Superior Court, an intervening ruling by the Court of Appeal of the State of California was rendered which affected the ultimate ruling by the Appellate Department. The circumstances were as follows:

Following the decisions of this Court of June 21, 1973, the Court of Appeal of the State of California, Second Appellate District, Division Five, rendered an opinion in a case entitled *People v. Enskat,* 33 Cal. App.3d 900, 109 Cal.Rptr.433. The court rejected

the claim that California Penal Code §§311 and 311.2 were unconstitutional and unenforceable as a result of the decisions of this Court on June 21, 1973, as against claims that in the light of those decisions the California state obscenity statute had been rendered vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments. The Court of Appeal held that the state obscenity statute, as written, could continue to be applied in state obscenity prosecutions.

A petition for hearing to the California Supreme Court was denied on October 24, 1973. Among the questions presented to the California Supreme Court were whether the standards for judging obscenity embodied in the California state obscenity statute have been rejected as constitutionally impermissible by the rulings of this Court on June 21, 1973, and whether the provisions of California Penal Code §§311 and 311.2 are vague, ambiguous, uncertain and overbroad, since the standards for judging obscenity are unworkable and incapable of objective measurement and the statute fails to proscribe specifically defined sexual conduct, all in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution.

The opinion and judgment of the Court of Appeal, as aforestated, and the denial of hearing thereafter by the California Supreme Court on October 24, 1973, rejecting all constitutional objections to the state obscenity statute, became binding upon the Appellate Department of the Superior Court, County of Los Angeles, State of California, in the then pending appeals before it in obscenity prosecutions.

A petition for a writ of certiorari to the aforesaid Court of Appeal in *Enskat v. California* has been filed with this Court, October Term 1973, No. 73-1136.

3. As a result of the ruling by the Court of Appeal in *Enskat*, holding that California Penal Code §311.2 meets the standards set forth in this Court's decisions of June 21, 1973, and is not vague or overbroad, the judgment of conviction in the case herein was affirmed by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, without opinion. On petition for rehearing or, in the alternative, for certification of transfer, the same aforestated constitutional and legal questions were urged upon the court. The petition for rehearing or, in the alternative, for certification was denied, as aforesaid. Thereafter, a remittitur issued from the Appellate Department, but on March 6, 1974, the court ordered recall of the remittitur and stayed the issuance of the said remittitur to and including April 10, 1974, to permit petitioner to file a petition for a writ of certiorari in the Supreme Court of the United States, the order also providing that any further stay thereafter was to come from this Court or a Justice thereof. On April 8, 1974, an order was made by Mr. Justice Douglas, continuing the order recalling the remittitur and staying its issuance, pending reconsideration of the application when the memorandum of the respondent is received.

## REASONS FOR GRANTING THE WRIT.

1. The provisions of the California obscenity law (Penal Code §§311, 311.2) solely embody the *Memoirs* test. The statute defines "obscene matter", taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to a prurient interest, *i.e.*, a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance. The state legislature "intentionally incorporated as part of the definition itself the important provision that obscene matter 'is matter which is utterly without redeeming social importance', changing the function of these words from a description of a matter of defense to an element of the offense". *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P.2d 152, 31 Cal.Rptr.800, 812 (1963). See, *Memoirs v. Massachusetts*, 383 U.S.413.

The state obscenity law does not define for regulation any specific sexual conduct. The petitioner herein was tried for an offense allegedly committed in 1969, and the standards for judging obscenity which were used by the trial judge and jury in the case, resulting in the judgment of conviction herein, were predicated solely upon the tripartite test as appears in the state obscenity law.

2. In *Miller v. California*, 413 U.S.15, this Court noted that since the decision in *Roth*, no majority of the Court had at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the

State's police power. The Court stated that ". . . we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment" (413 U.S. at 19-20).

Before enunciating the standards for judging obscenity, the Court unanimously rejected the *Memoirs* test. "The case we now review was tried on the theory that the California Penal Code §311 approximately incorporates the three-stage *Memoirs* test, *supra.* But now the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation." (413 U.S. at 23). The opinion of the Chief Justice noted the observation by Justice Harlan that "utterly without redeeming social value" did not seem to have "any meaning at all". Moreover, stated the majority opinion: "We do not adopt *as a constitutional standard* the 'utterly without redeeming social value' test of Memoirs v. Massachusetts." (413 U.S. at 24). Further, it was emphasized, "We also reject, *as a constitutional standard, the ambiguous concept* of 'social importance'." (413 U.S. at 25, n.7) (Emphasis added). Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. at 73, to which the Chief Justice pointed in *Miller,* agreed that the Court had "failed to formulate a standard that sharply distinguishes protected from unprotected speech", (413 U.S. at 83), and that none of the differing formulas enunciated by the individual Justices in the past could "reduce the vagueness to a tolerable level" (413 U.S. at 84). As a result of "our failure to define standards with predictable application", the past had been marked by a "lack of fair notice" and a

"chill on protected expression" (413 U.S. at 93). And Mr. Justice Douglas added in his dissenting opinion in *Miller:* "The Court has worked hard to define obscenity and concededly has failed." (413 U.S. at 37).

Petitioner submits, with deference, that the only conclusion which can be drawn from the opinion of the Court in the quintet of decisions rendered on June 21, 1973, is that a statute which purports to identify and delimit "obscenity" by a test of "utterly without redeeming social importance" is constitutionally unacceptable. In the view of this Court, the test is unworkable, inoperable, unachievable, vague and ambiguous. It is, in the words of this Court, ambiguous and vague and cannot be accepted "as a constitutional standard".

3. Another prong of the tripartite test of *Memoirs* which this Court found constitutionally infirm was the "national community" standard. This Court described such standard as "unrealistic" and "an exercise in futility". A national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable" and "neither realistic nor constitutionally sound" (413 U.S. at 31-32). Thus, the "national standard" test was found to be clearly unconstitutional. Nevertheless, such standard was "correctly regarded at the time of trial as limiting state prosecution under the controlling case law" (413 U.S. at 30-31).

Unlike the record presented in the case of *Miller v. California,* the petitioner here constantly objected to the use of a state community standard instead of a national community standard, as then required under the interpretive decisions of this Court. On appeal, petitioner specifically urged that the state obscenity law,

as construed and applied to authorize the judgment of conviction, solely upon the basis of a state standard instead of a national standard, violated the free speech and press and due process provisions of the First and Fourteenth Amendments.

Thus, petitioner was not only tried under the constitutionally vague and ambiguous standard of "utterly without redeeming social importance", but he was also refused a trial under a "national standard of First Amendment protection", correctly regarded at the time of trial "as limiting state prosecution under the controlling case law".

4. As heretofore stated, the state statute under which the judgment of conviction rests does not specifically define any physical sexual conduct allegedly subject to regulation. The statute only proscribes expression. This, again, is a defect of constitutional dimension, as the Court in its decisions of June 21, 1973, made clear.

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed . . . the basic guidelines for the trier of facts must be: . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . We emphasize that it is not our function to propose regulatory schemes for the States. That must await their

> concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion . . . Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (413 U.S. at 23-27).

Since the requirement that a state statute specifically define the sexual conduct the State proposes to regulate was deemed by this Court in *Miller* to be a critical due process requirement in order to satisfy that "precision of regulation" which the first Amendment demands, the absence of such specificity in California Penal Code §§311 and 311.2 is a third ground for invalidating the judgment of conviction herein.

5. In the light of the foregoing, the provisions of the state obscenity law are vague, ambiguous, uncertain and overbroad. The statute, on its face and as construed and applied to the petitioner herein, violates the free speech and press and due process provisions of the First and Fourteenth Amendments and the interpretive decisions of this Court. A trial conducted under statutes which are unascertainable, ambiguous, without clear meaning, incapable of objective measurement, and not limited to specified conduct, is a deprivation of due process in the most primary sense. Standards which are not specifically defined in the law, and which are incapable of objective measurement, fail to provide adequate notice to persons who are engaged in ac-

tivities which the statute purports to proscribe. In an area where First Amendment rights are implicated, the danger of such lack of meaningful standards is that the statute may sweep within its ambit expression ordinarily entitled to constitutional protection. Such statutes lend themselves to arbitrary and capricious enforcement by law enforcement officers and prosecutors and result in capricious and erratic judgments by courts and juries. *Plummer v. City of Columbus, Ohio,* 94 S.Ct.17; *Gooding v. Wilson,* 405 U.S.518; *Interstate Circuit, Inc. v. Dallas,* 390 U.S.676; *Papochristou v. Jacksonville,* 405 U.S.156; *Ashton v. Kentucky,* 384 U.S.195; *Giaccio v. Pennsylvania,* 382 U.S.399; *Winters v. New York,* 333 U.S.507.

The submission of the issues to the jury in this case, in the light of the absence of constitutionally accepted standards for judging obscenity, amounted to no more than a request for the jurors to assert their own subjective and unguided predilections with respect to the suppression of a motion picture film. The petitioner was deprived of a jury trial in the constitutional sense because the jury was merely licensed to create its own law of the case, its own personal standards. See, *Herndon v. Lowry,* 301 U.S.242.

The trial in the case herein, conducted as it was under the existing statutes, was a denial of due process. The statute does not contain the specific sexual conduct proscribed. The standards which are contained in the statute have been held to be constitutionally infirm. The law therefore did not give fair notice to

this petitioner of what was forbidden. Neither the charge nor the proof at the trial ever gave petitioner fair notice that criminal liability was dependent upon violations of specifically defined conduct or standards contained in the statute, See, *Rabe v. Washington*, 405 U.S.313; *Russell v. United States*, 369 U.S.749; *De Jonge v. Oregon*, 299 U.S.353; *Cole v. Arkansas*, 333 U.S.196.

Even the rudimentary requirements in criminal prosecutions of proof of guilt beyond a reasonable doubt (*In re Winship*, 397 U.S.358) were violated when petitioner in this case was compelled to stand trial under the state obscenity statute which, on its face and as construed and applied, is vague, ambiguous, uncertain and overbroad.

6. The *Enskat* ruling which became binding upon the Appellate Department of the Superior Court below appears contrary to the principles enunciated by this Court on June 21, 1973. In essence, the *Enskat* court held that a state statute which entirely omits the prerequisite of sexual conduct specifically defined by law, and which retains the tripartite test of *Memoirs* as the sole basis for the suppression of expression and for criminal prosecution thereunder, may be deemed valid despite the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution and the interpretive decisions of this Court.

The *Enskat* court appears to have been of the view that increased specificity in the state law was not re-

quired if the "utterly without redeeming social value" test was retained. However, this Court in its decisions on June 21, 1973, gave no indication that the retention of the "utterly without redeeming social value" test would in any way justify omitting specifically defined sexual conduct from a statute. This Court emphasized that if the requirements of due process notice are to be met, a state statute must specifically define the sexual conduct. Without such specificity in the statute, an obscenity law is rendered unconstitutionally vague, ambigous, uncertain and overbroad. Contrary to the view enunciated in *Enskat*, the California Supreme Court has never authoritatively construed the state obscenity statute to specifically include the sexual conduct which this Court held essential to the validity of a state obscenity statute. See the discussion in the petition for a writ of certiorari in *Enskat v. California*, October Term 1973, No. 73-1136, pages 19-24.

7. At the time the alleged offense herein was committed, California Penal Code §311 defined "knowingly" as meaning "having knowledge that the material is obscene". The record does not contain any competent evidence, it is submitted, to establish beyond a reasonable doubt that the petitioner here knew the alleged obscene nature and character of the publication. See, *Thompson v. Louisville*, 362 U.S.199; *In re Winship*, 397 U.S.358; *Vachon v. New Hampshire*, 94 S.Ct. 664.

**Conclusion.**

For the foregoing reasons, a writ of certiorari should issue to review the judgment and ruling of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respectfully submitted,

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## APPENDIX A.

### Judgment of the Appellate Department.

In the Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

Filed January 29, 1974.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR A 10391; Trial Court No. 337520.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, David J. Aisenson, Judge (311.2 PC).

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

BY THE COURT

/s/ Zack
Acting Presiding Judge.

/s/ Holmes
Judge.

/s/ Marshall
Judge

## APPENDIX B.

### Order Denying Rehearing.

Filed: February 20, 1974.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Murray Kaplan, Defendant and Appellant. Superior Court No. CR A 10391; Municipal Court of the Los Angeles Judicial District No. 337520.

ORDER DENYING REHEARING AND DENYING CERTIFICATION

The petition of appellant for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause to the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

Dated Feb. 20, 1974.

BY THE COURT

/s/ Zack
Acting Presiding Judge

/s/ Holmes
Judge

/s/ Marshall
Judge

## APPENDIX C.

### Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. California Penal Code §311, at the time of the commission of the alleged offense, provided as follows:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code §311.2, at the time of the commission of the alleged offense, read in relevant part:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter, is guilty of a misdemeanor . . ."

SUPREME COURT, U. S.

FILED

AUG 20 1974

IN THE

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October Term, 1973
No. 73-1722

MURRAY KAPLAN,

Petitioner,

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

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# BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

---

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1722

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

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BRIEF OF RESPONDENT
IN OPPOSITION TO GRANTING OF
WRIT OF CERTIORARI

---

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment and ruling of the Appellate Department of the Superior

Court of the State of California for the County of Los Angeles, entered against Petitioner in the above-entitled case on January 29, 1974, not issue.

## OPINIONS BELOW

No written opinion was rendered by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirming the judgment of conviction on January 29, 1974, following remand by this Court in Kaplan v. California, 413 U.S. 115 (1973). However, prior to remand by this Court, the said Appellate Department of the Superior Court rendered a memorandum opinion and judgment in this case in Kaplan v. California, 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372 (1972). See also Kaplan v. California, 415 U.S. 115 (1973), Petitioner's Opening Brief, Appendices C through G, inclusive.

## JURISDICTION

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered January 29, 1974. A copy of the said judgment appears in Appendix A of Petitioner's petition. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the California Court of Appeal was denied by the said Appellate Department on February 20, 1974. A copy of the said order appears in Appendix B of Petitioner's petition.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the California Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code §1471; California Rules of

Court, Rules 24(a) and 28(b); Smith v. California, 361 U.S. 147, fn. 2 (1959); Virginia Ry. Co. v. Mullins, 271 U.S. 220, 222 (1925).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

1. Whether Petitioner's conviction for violation of California Penal Code §311.2, is violative of First and Fourteenth Amendments and inconsistent with the decisions of this Court rendered on June 21, 1973, in Miller v. California, 413 U.S. 15; Kaplan v. California, 413 U.S. 115; Paris Adult Theatre I v. Slaton, 413 U.S. 49; United States v. 12-200 Ft. Reels of Super 8mm. Film, 413 U.S. 123; United States v. Orito, 413 U.S. 139; Heller v. New York, 413 U.S. 483; Roaden v. Kentucky, 413 U.S. 496; Alexander v. Virginia, 413 U.S. 836; and the decision of the California Court of Appeal in People v.

Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973).

2. Whether that portion of California's test of obscenity that the matter be "utterly without redeeming social importance" renders California Penal Code §§311 and 311.2 violative of the First and Fourteenth Amendments because of vagueness, ambiguity, uncertainty and overbreadth.

3. Whether the Petitioner's conviction, based on statewide community standards of prurient interest and customary limits of candor, rather than national standards, is in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments.

4. Whether the provisions of California Penal Code §§311 and 311.2, which do not not specifically define the exact sexual conduct which must be depicted or described in order to come within the provisions of said

sections, are vague, uncertain, overbroad and ambiguous, in violation of the First and Fourteenth Amendments.

5. Whether the jury was properly instructed in light of Miller v. California, supra; Kaplan v. California, supra; Paris Adult Theatre I. v. Slaton, supra; United States v. 12-200 Ft. Reels, supra; United States v. Orito, supra; Heller v. New York, supra; Roaden v. Kentucky, supra; Alexander v. Virginia, supra; and People v. Enskat, supra.

6. Whether California Penal Code §§311 and 311.2, on their face as authoritatively construed and applied, require proof of scienter, and whether such evidence was sufficient in this case.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution

of the United States and the pertinent provisions of California Penal Code §§311 and 311.2 as they appear in Appendix C of Petitioner's petition are applicable. Also, California Penal Code §312.1 which states:

> "In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution. Any evidence which tends to establish standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bear upon the question or

redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense. (Added by Stats. 1969, c. 925, p. 1854, §1. Amended by Stats. 1970, c. 1072, p. 1910, §3.)"

and California Penal Code §1127(b) which states:

"When, in any criminal trial or proceeding, the opinion of any expert witness is received in evidence, the court shall instruct the jury substantially as follows:

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist the jury in deciding such questions, the jury may consider the opinions with the

reasons stated therefor, if any, by expert who gives the opinion. The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable.

No further instruction on the subject of opinion evidence need be given. (Added by Stats. 1929, c. 876, p. 1939, §1.)"

## STATEMENT OF THE CASE

Petitioner was charged with violating California Penal Code §311.2 for the sale of the book entitled "Suite 69" at an "adult book store" in the County of Los Angeles on May 14, 1969. California Penal Code §311.2 states in relevant part:

". . . where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance."

Following a jury trial, Petitioner was convicted on the said violation.

Petitioner then filed an appeal with the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The Appellate Department rejected Petitioner's federal constitutional claims with a written opinion and affirmed the judgment of conviction. Kaplan v. Cali-

fornia, 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372 (1972). Petitioner's due and timely petition for rehearing or, in the alternative, for certification of transfer to the California Court of Appeal was granted on February 7, 1972, but denied by the California Supreme Court on February 17, 1972. Subsequently, Petitioner's petition for a writ of habeas corpus was denied by the California Supreme Court on April 12, 1972. Thereafter, Petitioner's petition for a writ of certiiorari was duly filed and granted by this Court in Kaplan v. California, 413 U.S. 115 (1973). In Kaplan this Court vacated the judgment of the Appellate Department of the Superior Court and remanded this case for further consideration in light on this Court's decision rendered in Miller v. California, 413 U.S. 15 (1973) and companion cases.

Following remand to the Appellate Department of the Superior Court, the California

Court of Appeal affirmed in People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973) that California Penal Code §§311 and 311.2 are constitutional and enforceable in light of Miller, supra, and companion cases.

The California Court of Appeal held that the state obscenity statute, as construed, could continue to be applied in state obscenity prosecutions. In Enskat a petition for hearing before the California Supreme Court was denied on October 24, 1973.

Therefore, the opinion of the California Court of Appeal in Enskat is binding upon the Appellate Department of the Superior Court. Following the ruling of this Court in Miller, et. al., and the aforesaid ruling in Enskat, the Appellate Department of the Superior Court affirmed the judgment of conviction of the trial court. It is well to note that subsequently, a petition for a writ of certiorari in Enskat v. California, October Term, 1973,

No. 73-1136, was denied by this Court. 42 U.S.L.W. 3712 (U.S. July 30, 1974).

Petitioner's petition for rehearing or, in the alternative, for certification of transfer was later denied by the said Appellate Department of the Superior Court on February 20, 1974. Thereafter, an order recalling the remittitur and staying issuance of the remittitur to and including April 10, 1974, was issued to permit Petitioner time to file a petition for a writ of certiorari in the Supreme Court of the United States. On April 8, 1974, an order was made by Mr. Justice William O. Douglas, which continued the above-stated order of the Appellate Department of the Superior Court pending reconsideration of said application for a writ of certiorari.

Respondent now replys with this brief in opposition to a granting of a writ of certiorari.

## REASONS FOR DENYING THE WRIT

1. California Penal Code §§311 and 311.2 define as obscene matter which, taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards, is to prurient, i.e., a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance.

It is incorrect to state, as does Petitioner, that the provisions of California Penal Code §§311 and 311.2 solely embody the test set forth in Memoirs v. Massachusetts, 383 U.S. 413 (1966), inasmuch as the California statute was enacted in 1961 and Memoirs, supra, was decided in 1966, some five years later. The California legislature mere-

ly adopted part of the definition of obscene matter set forth in Roth v. United States, 354 U.S. 476 (1957), as one of the elements of the crime set forth in Penal Code §311.2. Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152 (1963).

2. The California Court of Appeal in People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), did not speak to the question of whether California Penal Code §311 was specific enough on its face to meet the requirements of Miller, et. al., but instead limited itself to a consideration of whether it had been authoritatively construed so as to meet such requirements. The court in Enskat, supra, did not consider whether the California statute, on its face, was directed at depictions of defined sexual conduct, as opposed to expression [Miller, supra at 24, fn. 6 (1973)], or whether it was an existing state statute in which ". . . all that is required is that the

language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." [Miller, supra, at 28, fn. 10, as Mr. Justice Brennan stated for the Court in Roth v. United States, 354 U.S. 476, 491-492 (1957).] While Miller has been apparently interpreted as inferring that California Penal Code §311 is not specific enough on its face, Respondent submits that it is more specific than federal statutes which have been saved, such as 19 U.S.C. §1305(a) and 18 U.S.C. §1462. United States v. 12-200 Ft. Reels, supra, at 130, fn. 7; United States v. Orito, supra, at 140, fn. 1; United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

The California Court in Enskat, supra, ruled that California Penal Code §§311 and 311.2, as they have been authoritatively construed in the past, were valid in light of Miller, et. al. With this conclusion of

the California Court of Appeal, Respondent agrees.

Part of the test of obscenity under which Petitioner was convicted was the requirement that the matter be shown to be "utterly without redeeming social importance." As this Court correctly pointed out in Miller, supra, at 22, this test called on the prosecution to prove a negative, ". . . a burden virtually impossible to discharge under our criminal standards of proof." Nevertheless, the prosecution did so in this case. Respondent used the test of which Petitioner now complains which, until now, he has been content, if not delighted with, for 13 years.

Petitioner has seized upon the fact that this Court reduced the prosecution's burden to claim that California's statute, containing as it does, such a test, is obviously unconstitutional on its face. The most direct answer to Petitioner's contention is that if it were

correct, this Court would have so held in Miller, supra.

Respondent submits that nothing this Court said in Miller, et. al., can be fairly construed to imply that a conviction based partly on a required finding that the matter was without redeeming social importance can be said to be constitutionally invalid.

3. Petitioner's trial was conducted and his conviction was obtained upon a theory that a national standard of First Amendment protection applied, not a national community standard to determine what is obscene. Miller, supra, at 30. As this Court stated:

> "To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility. . . Nothing in the First Amendment requires that a jury

must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact."
Miller, supra, at 30-32.

In light of such reasoning, the jury in this case was instructed to decide whether the said book, "Suite 69," appeals to prurient interest and goes substantially beyond customary limits of candor measured by the contemporary community standards of the State of California. This instruction to the jury in this case is identical to that instruction given to the jury in Miller. As this Court stated in Miller, supra, at 33, citing Mishkin v. New York, 383 U.S. 502, 508-509 (1966):

". . . the primary concern with requiring a jury to apply the standard

'of the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, than a particularly susceptible or insensitive person--or indeed a totally insensitive one."

With this reasoning of the Court, Respondent fully agrees. Respondent submits that the requirement that the jury in this case evaluate the materials with reference to "contemporary standards of the State of California" serves the protected purpose enunciated and is constitutionally adequate. Miller, supra, at 33-34. As in Miller, proof of contemporary community standards of prurient interest and customary limits of candor, the so called "community standard," was of such standards as they existed in the entire State of Califor-

nia, and not some smaller area nor of the entire nation.

The aforesaid concepts were approved by this Court in Miller and continue to be applied in California. It is apparent to Respondent that Petitioner fails to distinguish such concepts in his argument.

If one accepts Petitioner's theory that a national standard of First Amendment protection is now "clearly unconstitutional", and only a statewide standard can apply, it is difficult to see how this or any other obscenity case can possibly present a federal question. Actually, this Court left unsettled the question of how small a geographic area may be and still establish a viable constitutional standard (albeit of pruriency and limits of candor). Under Petitioner's theory, the standard of First Amendment protection may end up as small as a jury box. Respondent doubts that Petitioner seriously desires such

a course of action.

4. There exists no express authority for Petitioner's proposition that California Penal Code §§311 and 311.2 do not on their face meet the specificity requirements of Miller. Rather, it must be inferred from this Court's opinions in Miller, supra, and Kaplan, v. California, 413 U.S. 115 (1973) and from the fact that the California Court of Appeal in Enskat, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973) which addressed itself only to the question of how the statute had been construed in order that the due process requirement be satisfied, that the "precision of regulation" which the First Amendment demands had been met. Since this Court stated that a statute might be valid as written or construed, and left the question up to the Orange County Superior Court in Miller and the Los Angeles County Superior Court in Kaplan, therefore, Petitioner's argument that the statute is not

specific on its face is without merit because it does not address itself to the question of whether it has been properly construed. It is well to note that this Court denied a petition for writ of certiorari in Enskat v. California, October Term 1973, No. 73-1241, 42 U.S.L.W. 3717 (U.S. July 30, 1974); and denied an appeal in Miller v. California, October Term 1973, No. 73-1508, 42 U.S. L.W. 3719 (U.S. July 30, 1973); all California cases dealing with the constitutionality of California Penal Code §§311 and 311.2.

5. Petitioner seems to argue as if his case were tried according to the standards set forth in Miller, et.al., but by virtue of the California statute. The fact is, the standards of proof met by the prosecution in Petitioner's case were much more stringent than those which Miller allows. The record in this case utterly and completely refutes Petitioner's contention that the jury was

requested to assert their own subjective and unguided predilections with respect to the suppression of said book.

In Miller, et. al., it is implicit that a conviction under California Penal Code §311.2 could be sustained, at the very least, if the California statute had been authoritatively construed as were federal statutes in United States v. 12-200 Ft. Reels, supra; United States v. Thirty-Seven Photographs, supra; and United States v. Orito, supra. With regard to California case law the California Court of Appeal in Enskat, supra, determined that California's obscenity statutes had been so 'authoritatively construed" and Respondent submits that Petitioner's contention in this regard lacks merit or serious consideration.

As previously stated, the California Court of Appeal in Enskat held that, prior to the date Petitioner violated Penal Code § 311.2, California's obscenity statutes had been au-

thoritatively construed in such a manner and thus, satisfied the requirements of Miller, et. al. Petitioner urges that this is not so, but it seems to Respondent that he is merely attempting to substitute his judgment for that of the California Court of Appeal and California Supreme Court.

In the first place, it seems to Respondent that this Court, by its order in Miller and companion cases, decided that the question be left to state courts. Quoting from Miller, supra, at 29, this Court stated:

> "Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously before the adoption of the First Amendment to this day."

See Roth v. United States, supra, at 482-485

Inherent in this quote is the concept that interpretation of California statutes is a function of the state courts and not the federal courts. Also, Petitioner has made no showing that the California Supreme Court and California Court of Appeal are not to be trusted to carry out the mandate of this Court.

To grant this petition would be tantamount to an expression of willingness of this Court to review practically every previous obscenity case from each of the 50 States in the Union.

Second, it seems clear that the opinion that the California obscenity statute had been authoritatively construed so as to meet requirements and are even more stringent than those imposed by Miller, supra, and United States v. 12-200 Ft. Reels, supra.

Finally, Petitioner urges that only an au-

thoritative judicial construction could only have issued from the California Supreme Court, and no lower court, in only one case, specifically reading into the statute particular types of sexual conduct which might not be depicted or described. In fact, the California Supreme Court has cited People v. Enskat, supra, as authority for the proposition that California Penal Code §§311 and 311.2 are constitutional in light of Miller, et.al., In re Koomer, Crim. No. 17835, July 3, 1974. Also, this Court denied a petition for a writ of certiorari in Enskat v. California, October Term 1973, No. 73-1241, 42 U.S.L.W. 3717 (U.S. July 30, 1974), which dealt with the constitutionality of California Penal Code §§311 and 311.2.

Petitioner misunderstands this Court's ruling of June 21, 1973, if he believes they held prior requirements for judging obscenity constitutionally deficient. This Court would

have reversed, rather than remanding. This Court remanded for the purpose of the state court determining whether its statute had been properly construed; in California's case this Court's instructions were carried out and the question properly settled.

6. California Penal Code §311.2 makes it an offense to "knowingly" exhibit any obscene matter. The trial court correctly instructed the jury that "knowingly" means that the Petitioner knew the "character of the concontents of the material in question." To comply with the statute as authoritatively construed there need not have been knowledge of the matter's actual obscenity. Said instructions have been held to be proper on many occasions.

As to the sufficiency of the evidence of scienter, the evidence established that Petitioner owned and operated and "adult bookstore" and that he knew the contents of the

book [R.T. p. 35-59]. In view of the above, Respondent contends that the Petitioner had the requisite scienter necessary and also that the jury instructions were proper.

## CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny this petition.

Respectfully submitted,

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